(h) That the power delegated to Beng Siew to make investments on behalf of the company be cancelled.

(i) That bonus in future shall be 2% of the net profits of which 1% shall be for the managing director and 1% for the other directors.

(j) That no bonus be paid until after the passing of the company's accounts at the Annual General Meeting.

Having now heard arguments on the question of costs, I would order that the second and third respondents do pay the appellant's costs both here and in the court below. They must also pay the separate costs of the first respondent company, if any, both here and in the court below. There will be a certificate for two counsel.

**Wan Suleiman F.J.** and **Tan Chiaw Thong J.** concurred.

*Appeal allowed.*

Solicitors: *Tang & Co.; Yong & Wong.*

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## SUBRAMANIAM & ANOR. v. PUBLIC PROSECUTOR

**[A.Cr.J. (Ajaib Singh J.) April 9, 1975]**
**[Seremban — Criminal Appeal No. 21 of 1974]**

*Criminal Law and Procedure — Summary trial — Plea of guilty — Charges not read and explained to accused persons separately — Sentence of whipping — Penal Code, ss. 34, 392 and 397 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 305 and 422.*

*Penal Code, ss. 34, 392 and 397 — Robbery — Sentence of whipping.*

The appellants were charged on two counts under sections 392 and 397 read with section 34 of the Penal Code. At the trial the charges were not read and explained to the appellants separately. The appellants pleaded guilty and were sentenced to four years' imprisonment and whipping. The appellants appealed.

**Held:** as the charges were not read and explained to the appellants separately the convictions and sentences must be set aside.

*Cases referred to:-*

(1) *Chua Ah Gan* v. *Public Prosecutor* [1958] M.L.J. liv.

(2) *Fong Siew Poh & Ors.* v. *Public Prosecutor* (1933) 1 M.C. 155.

(3) *R.* v. *Boyle* [1954] 2 All E.R. 721.

CRIMINAL APPEAL.

*Datuk Balwant Singh* for the first appellant.

*K. Gunaretnam* for the second appellant.

*Abu Hashim bin Haji Abu Bakar* (Deputy Public Prosecutor) for the respondent.

**Ajaib Singh J.:** This was an appeal against sentence. The appellants were charged on two counts under sections 392 and 397 read with section 34 of the Penal Code and upon their pleading guilty to the charges they were each sentenced to four years' imprisonment. In addition the first appellant was ordered to receive two strokes of the rotan and the second appellant was ordered to receive one stroke of the rotan.

The facts of this case as recorded by the learned President of the Sessions Court were that on August 26, 1974 at about 2 a.m. the two appellants together with a third person went to Labu Estate. One of them proceeded to the house of the complainant who was a hospital assistant of the estate dispensary. This person called out the complainant and told him that he had brought an injured man to the dispensary and requested the complainant to give him medical treatment. The complainant dressed up and accompanied the person to the dispensary which was a short distance away from the complainant's house. There the complainant saw two persons seated on a bench near the dispensary. The complainant then opened the dispensary and switched on the lights whereupon the three persons followed him in. Suddenly one of the three confronted the complainant and pointed a knife at his stomach and told him that it was their intention to rob him. The complainant tried to raise an alarm but one of the three pushed a towel into his mouth and removed a gold ring which the complainant was wearing. One of the three persons then left the dispensary and went to the complainant's house. There he told the complainant's wife that her husband wanted her to go to the dispensary. She accompanied this man to the dispensary and she too was confronted by the same person who was armed with a knife. This person then removed a gold ring and a gold chain from her. Both the complainant and his wife were then detained at the dispensary while one of the three persons went back to the complainant's house and ransacked a cupboard in the bedroom from where he took away one Rolex watch, one Longines watch and a lady's Hitex watch. While this was going on a conductor of the estate who was living nearby happened to see that the dispensary lights were on and becoming suspicious he walked up to the dispensary. On seeing him the three persons ran away and were seen driving off in a car. Shortly after that at about 3.10 a.m. the complainant lodged a report at Labu police station. The first appellant was arrested in the afternoon of the same day and the police recovered the three watches from him. Later at about 10.30 p.m. the second appellant was arrested and he led the police to a house in Pajam Estate from where the two gold rings and the gold chain were recovered. A third person alleged to be involved in this case was arrested two days later.

The appellants were produced before the learned President of the Sessions Court on April 30, 1974. They appeared in person and were not represented by counsel. A brief note purporting to show that the appellants were charged and that they were called upon to plead thereto appears in the appeal record as follows:—

"Charge Read Explained — Plead Guilty — Understand Nature and Consequences of Plea."

Following this note the learned president proceeded to record the facts of the case as outlined by the prosecuting officer which I have set out briefly at the outset of this judgment. Thereafter, the learned president after recording "Facts admitted by both the

accused" convicted the appellants and imposed the sentences of imprisonment and whipping.

With respect, I must say at once that the manner in which the appellants were charged and their pleas accepted by the learned president was altogether bad and irregular. In the first place it was not clear from the record whether one or both the charges were read out and explained to both or one of the appellants. It was also not stated in the record if the appellants had understood the charges that were read out to them. A charge should not only be read over and explained to an accused person but it should also be stated in the record that this has been done and that the accused understands the charge. I think it will be useful to bring to the attention of the subordinate courts the case of *Chua Ah Gan* v. *Public Prosecutor*[1] wherein Hepworth J. had stressed that as a matter of practice whether an accused person pleads guilty or not it should always be clear in the record that the charge had been read, explained and understood and that if the plea is one of guilty it should also be made clear in the record that the accused understands the nature and consequences of the plea.

Secondly, it would appear from the record that the charges were not read and explained to the appellants separately and that their pleas were also not taken separately. This again was improper. As long ago as 1933 it was held in the case of *Fong Siew Poh & 3 Ors.* v. *Public Prosecutor*[2] that a conviction based on a joint plea of guilty by two or more accused persons is bad and irregular. The charge should be explained to the accused persons separately and their pleas recorded separately. Also, where there are two or more charges against an accused person the charges should be read out and explained to him separately and the plea recorded separately on each charge. (See *R.* v. *Boyle*).[3]

In the present case the charges against the appellants were not read and explained to them separately and there was nothing in the record to indicate that the appellants understood the charges. Further the learned president instead of calling upon the appellants to plead separately had in fact accepted a joint plea of guilty from them. These were irregularities which could not be cured under section 422 of the Criminal Procedure Code. The appellants had appealed only against sentence because having apparently pleaded guilty they were precluded from appealing against their convictions under section 305 of the Criminal Procedure Code. However, by the bad and irregular manner in which the appellants had been charged and their pleas recorded it could hardly be said that the appellants had pleaded guilty according to law. I therefore set aside the convictions and sentences imposed upon the appellants and ordered a retrial before another president.

There is another aspect of this case which remains to be considered although it was not discussed during the hearing of the appeal before me. The appellants were as stated earlier charged under sections 392 and 397 read with section 34 of the Penal Code. Section 397 provides for the imposition of an additional punishment by way of whipping if at the time of committing or attempting to commit the substantive offence of robbery the offender is armed with or uses a deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person. However, whipping may be ordered by the court only against the particular offender who is thus armed or causes grievous hurt or attempts to cause death or grievous hurt and not against a person who associates with such armed offender in the commission of the offence of robbery but is himself not armed with a deadly weapon and does not himself cause grievous hurt or attempts to cause death or grievous hurt to any person. The joint liability of two or more persons in the doing of a criminal act under section 34 of the Penal Code does not extend to section 397 of the Code. Section 397 provides for the imposition of an additional sentence and its provisions are to be invoked only against an offender who actually acts in contravention of that section and to no other person no matter how much that person may have acted in concert and in furtherance of the common intention to commit robbery.

In the present case only one of the three robbers was armed with a knife which was a deadly weapon within the meaning of section 397 of the Penal Code. The other two were not armed nor did they cause grievous hurt or attempt to cause death or grievous hurt to any person. The additional punishment of whipping under section 397 could therefore be imposed only against the armed offender but unfortunately the facts of the case as recorded by the learned president do not state which one of the offenders was armed with the knife. The appellants as I have mentioned earlier were charged under sections 392 and 397 read with section 34 of the Penal Code and from the record it appeared that the learned president imposed whipping against the appellants in the exercise of his powers under section 397 of the Penal Code. Before imposing any whipping under section 397 the learned president ought to have ascertained from the prosecuting officer as to which particular offender was armed. This was not done and in the absence of any evidence that either of the appellants had acted in contravention of section 397 of the Penal Code the learned president had no power to order whipping under that section. It need hardly be stressed how important it is for presiding officers in criminal courts to obtain full and accurate details of a crime of which an accused person pleads guilty for only then can the courts be in a good position to assess the seriousness or otherwise of the case and impose appropriate sentences in accordance with the law.

Although the learned president had no power to impose the additional punishment by way of whipping under section 397 of the Penal Code his order of whipping was nevertheless legal and valid for a different reason. There was no need in fact to bring in section 397 of the Penal Code in the two charges preferred against the appellants. Section 392 of the Penal Code provides for the punishment for robbery with a term of imprisonment which may extend to ten years and with fine. The section provides further that if the robbery is committed between sunset and sunrise the imprisonment may be extended to fourteen years and the offender shall also be liable to fine or whipping. Therefore if the proceedings in this case had been otherwise regular the learned president would have been empowered to order whipping against the

appellants by virtue of section 392 itself without having to invoke the provisions of section 397 because the robbery was committed between sunset and sunrise.

The framing of the charges in this case and the subsequent conduct of the proceedings in court left much to be desired. The administration of criminal law is not to be treated light-heartedly but is to be carried out seriously with a sense of dedication and with great care and attention.

*Order accordingly.*

Solicitors: *Syarikat Datuk Balwant Singh; Gunaretnam & Co.*

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## TAISHO MARINE & FIRE INSURANCE CO. LTD. v. WONG POO PENG & ORS.

**[O.C.J. (Mohamed Azmi J.) April 29, 1975]**
**[Kuala Lumpur — Civil Suit No. 5 of 1974]**

*Practice and Procedure — Application to set aside default judgment — Defence on merits — Guarantee — Release — Contracts Act, 1950, s. 91.*

The third defendant applied to set aside a judgment in default of appearance entered against him. The third defendant had stood as guarantor with the second defendant for the first defendant a partner of S.P. & Low Agencies in respect of payment of insurance premiums. It was alleged (1) that the third defendant had not been properly served with the writ of summons and (2) that the letter of guarantee had been automatically revoked when the constitution of the partnership of S.P. & Low Agencies was changed.

**Held:** (1) on the facts the writ of summons had been properly served on the third defendant;

(2) that the guarantee in this case was not joint but several but even assuming that it was a joint guarantee the common law principle that a release of a joint guarantor without the consent of the other would release him from his obligation under the bond is not applicable in this country because of section 91 of the Contracts Act, 1950;

(3) the applicant had not shown a *prima facie* defence on the merits in law or in fact and therefore the application must be dismissed.

*Case referred to:-*

(1) *Song Bok Yoong* v. *Ho Kim Poui* [1968] 1 M.L.J. 56.

CIVIL SUIT.

*K. Y. Chew* for the defendant/applicant.

*J. Somasundaram* for the plaintiff/respondent.

**Mohamed Azmi J.:** This is an application by Summons-in-Chambers dated April 29, 1974 by Low Kim Yee, the third defendant, to set aside a Judgment In Default Of Appearance in the sum of $49,182.34 and costs at $120 entered against him on March 15, 1974. Low Kim Yee and the second defendant, Lim Hee Hong, stood as guarantors for the first defendant, who is a partner of the firm of S. P. & Low Agencies, in respect of payment of insurance premiums due from the said Agencies to the plaintiff. By specially indorsed writ, the plaintiff sued the three defendants for the adjudged sum of $49,182.34.

Before me, it is argued by the third defendant/applicant that he was in fact not served with the writ of summons on February 21, 1974 at 3.15 p.m. at Room 307, Third Floor, Kwang Tung Association Building, No. 44, Jalan Pudu, Kuala Lumpur, as alleged in paragraph 4 of affidavit of service of Teo Kim Tiang, the process server, affirmed on February 27, 1974. Secondly, it is contended that, even if the service was good, he has a good defence to the plaintiff's claim on the ground that the letter of guarantee dated May 13, 1968 (Exhibit "NAM 1" attached to the further affidavit of Mr. Norman Alexander Marjoribanks affirmed on April 25, 1975) was automatically revoked once the constitution of the partnership of S. P. & Low Agencies was changed on August 1, 1970.

On the first ground, the applicant is relying mainly on the affidavit of Mok Wee Meng affirmed on August 29, 1974 who is an architect trading under the name of Messrs. Lee & Mok Chartered Architect. He affirms that he has been in occupation of Room 307, Third Floor, Kwang Tung Association Building, Jalan Pudu, since November 1, 1973, and that on February 21, 1974 when the writ was alleged to have been served on the applicant, he is not aware of the writ being served in Room 307 on the applicant, and nor has he ever seen or has any knowledge of the said writ of summons in his office. By paragraph 4 of the applicant's supporting affidavit affirmed on August 29, 1974, the applicant also denies that he has ever accepted service or process of the writ from Teo Kim Tiang, the process server, and neither has he ever seen the process server nor a copy of the writ of summons. In short, it is the contention of the applicant that since Room 307 was not occupied by him in February 1974 but by the architect, Mok Wee Meng, the writ of summons could not have been personally served on him in that room by the process server on February 21, 1974.

In this case, it is not in dispute that the applicant was in occupation and the tenant of Room 307 prior to November 1, 1973. Learned counsel for the respondent/plaintiff submits that there is no evidence to show any change of tenancy from the applicant to the architect on November 1, 1973. The receipt for the month of February 1974 marked "MWM-1" annexed to the affidavit of the architect is not, it is argued, sufficient to prove any change of tenancy. Further, the said receipt was only signed by the recent collector and not by the landlord. Failure to produce the tenancy agreement implies that the applicant is still the legal tenant and in occupation of Room 307 at the material time.

On the balance of probabilities in the evidence, I have come to the conclusion the writ of summons was in fact served on the applicant at Room 307 on February 21, 1974 as alleged by the process server. I must also reject the evidence deposed in paragraph 4 of the applicant's affidavit dated August 29 that he had never seen the process server or the copy of the writ of summons. In my view, at all material times, Room 307 is the only normal address of the applicant, and there is nothing improbable that the applicant was in Room 307 on February 21, 1974 at 3.15 p.m. having regard to the following facts. Firstly, from the affidavit of Mr. Norman Alexander Marjoribanks affirmed on November 1, 1974, it is clear from the letter of guarantee dated May 13, 1968 signed by the applicant that his address is at Room 307. (See exhibit marked "NAM 3"). His address remained the same in October 1973 as shown by the letter of demand, a